BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DIANE NEWTON	)	
Claimant	)	
	)	
VS.	)	Docket No. 1,046,373
	)	
CITY OF WICHITA	)	
Self-Insured Respondent	)	
	)	

ORDER

Both parties requested review of the November 5, 2010 Award by Administrative Law Judge (ALJ) Thomas Klein. The Board heard oral argument on February 18, 2011.

APPEARANCES

Roger A. Riedmiller, of Wichita, Kansas, appeared for the claimant. Edward D. Heath, Jr., of Wichita, Kansas, appeared for self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.[1] In addition, the parties confirmed that pursuant to their agreement, as of April 6, 2009, claimant's post-injury average weekly wage is $318.86 and when compared to her preinjury average weekly wage[2], the resulting wage loss is 57.3 percent, as found in the Award.

[1] Although the Award, at one point, lists the date of accident as July 1, 2010, the parties agree this is a typographical error. The correct date of accident is July 1, 2006.

[2] Claimant's employment with respondent was terminated on April 6, 2009, and as a result, her post-injury, post-termination average weekly wage increased to $747.18. See K.S.A. 44-511.

ISSUES

The ALJ assigned claimant a 15 percent permanent partial whole body impairment along with a work disability beginning July 1, 2006 based upon an average of the task loss opinions offered by the two testifying physicians averaged with claimant's actual wage loss.[3]

Both parties have appealed this decision and ask the Board to modify the ALJ's conclusions with respect to both functional impairment and the claimant's task loss. Respondent contends claimant's functional impairment should be modified to 10 percent, reflecting the opinions of Dr. Barrett and that her analysis of task loss, 20 percent, is more persuasive, Independent of that argument, respondent contends the ALJ's method of calculation was inappropriate and, in effect, gives claimant benefits for a work disability during a period when she was earning a comparable wage, in violation of the language set forth in K.S.A. 44-510e(a).

Claimant maintains that the Award should be modified to reflect a higher functional impairment and task loss. Claimant argues that Dr. Murati's analysis of her functional impairment as well as her task loss is more persuasive than those offered by Dr. Barrett, as she failed to take into account the opinions of the physical therapists who believed claimant to be less capable of performing her past work duties. Claimant also believes the ALJ's method of calculating the Award was proper, in light of *DeGuillen* and *Bohanan*[4], and therefore that approach should be affirmed, after increasing the functional impairment and task loss findings.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant sustained an admittedly compensable injury to her low back on July 1, 2006 when she was lifting up a heavy dog carcass. Claimant received conservative treatment from a number of providers and returned to work but her symptoms, including low back pain and tingling into her legs, continued. Further diagnostic tests were done and after an extended period of time, claimant eventually claimant found her way to Dr. Sandra

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[3] The Award grants a work disability based upon a constant 28.5 percent task loss and a 51.2 percent wage loss from July 1, 2006 to April 5, 2009 and commencing April 6, 2009 and continuing he found the wage loss to be 57.3 percent.

[4] *DeGuillen v. Schwan's Food Manufacturing, Inc.*, 38 Kan. App.2d 747, 172 P.3d 71 (2007), *rev. denied* ____ Kan. ____ (2008); *Bohanan v. U.S.D. No. 260 and Kansas Association of School Boards*, 24 Kan. App.2d 362, 947 P.2d 440, 122 Ed. Law Rep. 797(1997).

Barrett. Dr. Barrett ordered extended physical therapy treatments and then released claimant, with restrictions. Claimant continued working for respondent until April 6, 2009 when she was terminated. She went on to secure part-time employment with the postal service and as of the time of the Regular Hearing, had a post-injury average weekly wage of $318.86.

Two physicians testified as to claimant's resulting permanent impairment and task loss. Dr. Barrett, the treating physician, saw claimant on two occasions. At the initial visit, on January 29, 2009 claimant, was diagnosed with low back pain with multilevel degenerative disc disease. Dr. Barrett recommended some nerve studies, continued lifting restrictions, and 6 weeks of physical therapy. At the conclusion of this treatment, Dr. Barrett assigned a DRE III, 10 percent permanent partial impairment based upon the 4th edition of the *Guides,* and included a 50 pound weight limit.[5] Dr. Barrett explained that her rating was based upon claimant's radiculopathy symptoms. Dr. Barrett also opined that claimant sustained a 20 percent task loss based upon a task analysis prepared by Jerry Hardin.[6]

At her attorney's request, claimant was evaluated by Dr. Pedro Murati, who diagnosed low back pain secondary to radiculopathy, and assigned the following rating:

> According to the Fourth Edition of the Guides to the Evaluation of Permanent Impairment, for the low back pain secondary to radiculopathy, using the ROM [range of motion] as a differentiator, this claimant is placed in lumbosacral DRE IV for 20 percent whole person impairment.[7]

Upon cross examination, Dr. Murati was asked if, in using the range of motion model as a differentiator, he had measured claimant's range of motion of the low back, he conceded that he had not.[8]

Claimant's counsel then asked Dr. Murati to elaborate on his rating and explain how he came to rest upon the 20 percent functional impairment.

> A: Well, the range of motion method as a differentiator, first you get the condition of the back in terms of what the disc may be doing. To that, you combine the effects of the radiculopathy. And to that you combine the range of motion deficit. Now, with this lady, okay, you have to see that she has a depressed left ankle

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[5] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are to the 4th edition unless otherwise noted.

[6] Barrett Depo. at 12-13.

[7] Murati Depo. at 14.

[8] *Id.* at 19.

> reflex, okay? So right off the bat you have some sort of radiculopathy. It is the S1 dermatome bilaterally that's affected. So you have S1 and S1 bilaterally affected. Okay, each one of those using -- I think it is the last table in the book in chapter 3, that's a 3 percent lower, okay? Now, she also has a problem with the right L5 dermatome. So on the right side the L5 gets an additional 3 percent lower. And she has great toe extensors at 4/5. Now, that's an L5 myotome, okay? And that is 8 percent lower extremity, okay? So for the right, you have a 3, a 3 and a 8. Okay, those combine to 14 percent lower. And on the left you have 3 and 8 which combines to 11 percent lower. Okay, Now, as you see, she had problems with her discs, a posterior protrusion at L5-S1 which is what is probably causing this. But it may be more than that. So for using table 75 this is a symptomatic disc that is a 7 percent whole person injury just for the disc. Now, the 14 percent lower extremity for the right radicular findings, that converts to a 6 percent whole person. Okay? And the 11 percent goes to 4 percent, okay? Now, if you combine 6 and 4 you go to 10. And an additional 7 goes to 16. Okay? So right off the bat without even measuring the range of motion of the back you have a 16 percent whole person impairment. If I had done range fo motion evaluation on her it would have probably placed me about 20 percent. But I don't need that. All I need is that 16. Hell, the book -- all I need is an 11 percent because the book says that you have to fit in between but the one below -- either the one below -- not in between but the one below or the one above. In this case, 16 is closer to 20 without even taking even taking into account lack of range of motion. So that's why I placed her on the DRE 20. [sic][9]

After this rather lengthy response, respondent's counsel then asked Dr. Murati-

> Q: Doctor, if you use the DRE category at page 110 of the AMA Guides to the lumbosacral spine, then she is a category that has a 10 percent rating for radiculopathy, is that right?
> A: That's why I used the 10 percent, yes.[10]

Dr. Murati went on to explain that because claimant's lumbar impairment involves bilateral nerve root compression she is entitled to *two* DRE III category findings which, when combined, yields a 19 percent - which is close to the 20 percent he ultimately assigned.[11]

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[12] "'Burden of proof' means the burden of a party to persuade the trier of

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[9] Murati Depo. at 22-24.

[10] *Id.* at 24.

[11] *Id.* at 25.

[12] K.S.A. 2005 Supp. 44-501(a).

facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[13]

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.[14]

The ALJ concluded that the opinions offered by each physician was equally persuasive and therefore, he found claimant sustained a 15 percent permanent partial impairment and a 25.8 percent task loss. He then correctly calculated the wage loss but commenced the resulting work disability at a time that claimant was still earning a comparable wage.

Both parties appealed the ALJ's functional impairment findings, although both parties understand that the work disability aspect of the Award makes this finding largely moot. Even so, both parties contend their respective physician is the more informed and persuasive. Respondent takes issue with Dr. Murati's 20 percent impairment characterizing it as "somewhat confusing" as Dr. Murati opined that claimant was entitled to *two* separate DRE impairment ratings for the same low back injury.[15] Claimant contends Dr. Barrett is no more informed than Dr. Murati so an average of the two opinions is, in her view, reasonable.

After considering the functional impairment ratings the physicians' explanations of how those ratings were derived, the Board concludes that in this instance, Dr. Barrett's opinions are more persuasive than those offered by Dr. Murati. When deposed, Dr. Murati offered an impairment opinion based upon his use of the range of motion model, as a differentiator. Yet, he did not take any range of motion measurements. When that approach was challenged, he offered an explanation that can only be described as convoluted. Even when he attempted to clarify his opinion, his ultimate explanation is that claimant sustained bilateral nerve damage so she is entitled to a bilateral DRE III impairment. However, Dr. Murati did not explain how this approach is supported by the principles contained within the *Guides.* He merely stated that "...I am sure that the educators of the [G]uides didn't think that a person with one-sided radiculopathy deserves the same impairment as somebody that has bilateral radiculopathy."[16]

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[13] K.S.A. 2005 Supp. 44-508(g).

[14] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 (1991), *rev. denied* 249 Kan. 778 (1991).

[15] Respondent's Brief at 1 (filed Dec. 20, 2010), citing Murati's Depo. at 24-25.

[16] Murati Depo. at 25.

Simply put, the Board is unpersuaded by Dr. Murati's opinions as to either claimant's functional impairment or her task loss and will disregard them, in favor of those offered by Dr. Barrett. Accordingly, the Award is modified to grant claimant a 10 percent permanent partial functional impairment as well as a 20 percent task loss as a result of her work-related injuries.

When, as here, an injury does not fit within the schedules of K.S.A. 44-510d, permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a), which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

Computing an employee's work disability under this statute is merely a mathematical exercise in light of recent Supreme Court opinions.[17] The trier of fact need only determine the claimant's task loss and actual wage loss, and then average the two to find the claimant's resulting work disability.

Here, the ALJ concluded that claimant sustained a 25.8 percent task loss, which was nothing more than an average of the two task loss opinions offered by the two testifying physicians. The Board concluded above that Dr. Barrett's task loss opinion was more persuasive than that offered by Dr. Murati. Thus, the Award will be calculated based upon a 20 percent task loss.

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[17] *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009).

As for the wage loss component of the calculation, the ALJ correctly calculated claimant's post-injury wage loss, but he calculated the work disability in such a manner that commenced the payment of the work disability benefits at a time that claimant was earning a comparable wages, inappropriately accelerating the payout and negating the fact that claimant's injury was being accommodated. And although claimant contends this method of calculation is appropriate and sanctioned by the appellate courts[18], the Board disagrees with claimant's interpretation of those cases.

The plain language of the statute K.S.A. 44-510e(a) precludes the approach claimant advocates. Moreover, both *Bohanan* and *DeGuillen* do not direct us to calculate claimant's award in the manner done by the ALJ and endorsed by the claimant. Rather, *Bohanan* and *DeGuillen* confirm that while claimant is being accommodated, and earning a comparable wage, claimant is only entitled to her functional impairment. If, and only if the claimant begins to sustain a wage loss in excess of 10 percent, then a work disability commences. And *DeGuillen* and *Bohanan* require us to consider those intervening weeks *for purposes of calculation*. This does not mean that claimant is entitled to weekly benefits for work disability during that period. To do so would defeat the language of the statute, which precludes a work disability when a claimant is earning 90 percent of more of the preinjury wages. As noted by the court in *DeGuillen*, "[s]o long as the worker is provided an accommodated position with a comparable wage, the employer benefits by the potential reduction in benefits by reason of no work disability."[19]

Accordingly, the Board finds the Award must be modified to find the work disability shall be commenced as of April 6, 2009, when the 57.3 percent wage loss emerged and created a 38.65 percent work disability. There is a notable gap between the period of time the functional impairment is paid out[20] and the work disability commences (April 6, 2009) during which claimant is not entitled to weekly benefits. As of April 6, 2009, the work disability is to be computed based upon the 38.65 percent work disability, with appropriate credit for the weeks paid for the 10 percent functional impairment (41.50 weeks).

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Thomas Klein dated November 5, 2010, is modified as follows:

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[18] *DeGuillen v. Schwan's Food Manufacturing, Inc.*, 38 Kan. App.2d 747, 172 P.3d 71 (2007), *rev. denied* ____ Kan. ____ (2008); *Bohanan v. U.S.D. NO. 260 and Kansas Association of School Boards*, 24 Kan. App.2d 362, 947 P.2d 440, 122 Ed. Law Rep. 797(1997).

[19] *DeGuillen* at 754-755, citing *Griffin v. Dodge City Cooperative Exchange*, 23 Kan App.2d 139, 147-148, 927 P.2d 958 (1996), *rev. denied* 261 Kan. 1084 (1997).

[20] Based upon a 10 percent functional impairment, claimant is entitled to weekly benefits at the rate of $435.58 for a period of 41.50 weeks.

Beginning July 1, 2006, the claimant is entitled to 41.50 weeks of permanent partial disability compensation at the rate of $435.58 per week or $18,076.57 for a 10 percent functional disability not directly followed by 118.90 weeks of permanent partial disability compensation at the rate of $483.00 per week or $57,428.70 for a 38.65 percent work disability beginning April 6, 2009, making a total award of $75,505.27.

As of March 3, 2011 there would be due and owing to the claimant 41.50 weeks of permanent partial disability compensation at the rate of $435.58 per week in the sum of $18,076.57 plus 99.57 weeks of permanent partial disability compensation at the rate of $483.00 per week in the sum of $48,092.31 for a total due and owing of $66,168.88, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $9,336.39 shall be paid at the rate of $483.00 per week for 19.33 weeks or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of February 2011.

_____
BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
Edward D. Heath, Jr., Attorney for Self-Insured Respondent
Thomas Klein, Administrative Law Judge